STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2007
v	No. 267662 Wayne Circuit Court
ERIC SCOTT CLARK, Defendant-Appellant.	LC No. 05-008184-01

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317. He was sentenced, as a second habitual offender, MCL 769.11, to 39 to 75 years' imprisonment. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues on appeal that there was insufficient evidence to submit a charge of first-degree murder to the jury, and therefore, his conviction of second-degree murder was an improper compromise verdict. We disagree. This Court reviews a court's directed verdict determination de novo, viewing the prosecution's evidence in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

To establish first-degree murder, the prosecution must show that the defendant intended to murder the victim, and the killing was accompanied by premeditation and deliberation. *People v Tanner*, 255 Mich App 369; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003). Premeditation and deliberation can be established through "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Premeditation and deliberation, for purposes of a first-degree murder conviction, require "sufficient time to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Defendant argues that there was no evidence that he had a premeditated intent to kill his father, Scott Clark, prior to the beating. However, premeditation could have developed after the beating began, when defendant stopped the beating to argue with his sister and mother. Such a

pause could have allowed defendant a "second look." Defendant also claims that the prosecution had only "mere speculation" that there was "a pause between the initial homicidal intent and the ultimate act . . . sufficient for premeditation and deliberation." *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998).

Premeditation and deliberation may be inferred from all the facts and circumstances. *Plummer*, *supra* at 301. The circumstances of Clark's murder are instructional in determining whether a first-degree murder charge was properly submitted to the jury. After exiting the family van at the church, defendant began the assault on Clark. When his mother and sister tried to stop him, he turned around to contend with them, and then turned back to Clark to resume the assault. The assault lasted from 10 to 20 minutes. The inference that there was a pause between initial intent and action is supported by testimony and, therefore, is not mere speculation. Thus, we hold that a jury could infer that defendant had time to reflect upon his actions, and in viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to submit a first-degree murder charge to the jury.

Next, defendant argues on appeal that his constitutional right to be sentenced on accurate information was violated by a misscoring of offense variables (OVs) 7, 9, and 13. We disagree. Generally, this Court reviews a preserved challenge to the scoring of the sentencing guidelines for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231, on rem 258 Mich App 679; 672 NW2d 533 (2003). This Court will uphold the trial court's scoring if there is any evidence in the record to support it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). The interpretation of the statutory sentencing guidelines and legal questions presented by application of the guidelines are reviewed de novo. *Babcock*, *supra* at 253.

Defendant argues that there was insufficient evidence to score 50 points for OV 7. Fifty points must be assessed under OV 7, aggravated physical abuse, if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). According to defendant, had the assault been less brutal his father would not have died, and, therefore, his conduct was already an element of the crime of second-degree murder. Defendant cites one case involving excessive brutality, *People v Hernandez*, 443 Mich 1, 17-18; 503 NW2d 629 (1993), where the Supreme Court upheld the trial court's score of 50 points under OV 7. Defendant distinguishes *Hernandez* by claiming that additional conduct designed to increase fear was shown in *Hernandez*, but not here, as the Hernandez defendant "all but admitted that he used excessive brutality several times when using 'good swings' of the baseball bat to hit the victim on the head." *Id*. at 17-18. However, conduct designed to increase fear is not a prerequisite for finding conduct to be excessively brutal. See *id*.; see also *People v Wilson*, 265 Mich App 386; 695 NW2d 351 (2005).

Aside from the defendant in *Hernandez* admitting to using excessive brutality, this case and *Hernandez* are similar in that both cases involved a "vicious, repeated, senseless beating." *Hernandez*, *supra* at 18 n 27. The victim in *Hernandez* suffered serious injuries as a result of being beat with a baseball bat, including 15 stitches in his head, a broken finger, and torn cartilage in his wrist, *id*. at 18, and Clark suffered from bleeding between the skull and brain,

multiple fractures of his ribs, fractures of his cheek bones and eye sockets, and he ultimately died as a result of his injuries. We find that, similar to the defendant in *Hernandez* going beyond what was necessary to commit assault with intent to murder, *id*. at 3, defendant went beyond what was necessary to commit second-degree murder. Defendant punched Clark in the face enough times and with enough force to render him unconscious, stomped on Clark's prone body enough times and with enough force to leave multiple shoe prints on Clark's skin, and kicked Clark in the head and face with steel-toed boots, causing multiple bones in Clark's face to shatter. The beating lasted between 10 and 20 minutes. Therefore, the record adequately supported a score of 50 points under OV 7.

Next, defendant argues that the trial court abused its discretion by scoring ten points under OV 9. Between 10 and 100 points are scored under OV 9 if there was more than one victim. MCL 777.39(1); *People v Wilkens*, 267 Mich App 728, 741; 705 NW2d 728 (2005). Ten points are scored if there was more than one but fewer than ten victims. *Id*. A victim is someone "who was placed in danger of injury or loss of life." *Id*.; MCL 777.39(2)(a). The prosecution argued successfully at sentencing that defendant's sister and mother were both in danger of injury and, in fact, were assaulted by defendant. Defendant claims that he was specifically fighting his father, so no one else was in danger. He also argues that, because he was unarmed, no one was in danger of being struck by a stray bullet or the slash of an errant knife.

However, the language of OV 9 does not require that defendant be armed with a weapon or that he have a specific argument with one of the additional victims. To score points under OV 9, all that is required is that there be more than one victim "who was placed in danger of injury or loss of life." *Wilkens*, *supra* at 741. Here, the trial court found that defendant placed his mother and sister in danger, despite his being unarmed and not having an argument with them. Defendant pushed his sister hard enough that she would have fallen had her mother not caught her, and he raised his hand to hit his mother. The trial court did not abuse its discretion by scoring ten points under OV 9.

Finally, defendant argues that the trial court incorrectly scored 25 points under OV 13. Twenty-five points are scored under OV 13 when the defendant engages in "a pattern of felonious criminal activity" involving three or more offenses against a person, which includes the sentencing offense, within the last five years. MCL 777.43; *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). The criminal activity need not result in a conviction. MCL 777.43(2)(a). Here, one of the three offenses needed to score 25 points was a juvenile adjudication,[1] and defendant claims that OV 13 does not apply to juvenile conduct because it is not criminal in nature. While defendant is correct that juvenile proceedings are civil in nature pursuant to MCL 712A.1(2), the plain language of MCL 777.43 does not reference the nature of the proceedings and it does not except the actions of juveniles. Rather, the statute requires only "felonious criminal activity." Therefore, we hold that the trial court's discretionary decision to

[1] The juvenile charge involved first-degree criminal sexual conduct, but defendant was adjudicated guilty for aggravated assault. Defendant's second crime against a person was a charge and conviction for assault and battery of an FIA employee.

score 25 points under OV 13 was not outside the range of principled outcomes necessary to find an abuse of discretion.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood